Filed.

April 23d 1879

Supreme Court of the United States.

OCTOBER TERM, 1878.

THE TOWN OF MOUNT PLEASANT AND THE TOWN OF CALEDONIA, Appellants, vs. CHARLES BECKWITH.	No. 252.
THE TOWN OF MOUNT PLEASANT AND THE TOWN OF CALEDONIA, Appellants, vs. WILLIAM W. CORNELL AND LATHAM C. STRONG, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LATHAM CORNELL, DECEASED.	No. 527.

BRIEF FOR APPELLEES.

WM. P. LYNDE,
COUNSEL.

Joseph L. Pearson, Printer, 9th and D streets, Washington.

Supreme Court of the United States.

OCTOBER TERM, 1878.

THE TOWN OF MOUNT PLEASANT AND THE TOWN OF CALEDONIA, APPELLANTS,
vs.
CHARLES BECKWITH.
} No. 252.

THE TOWN OF MOUNT PLEASANT AND THE TOWN OF CALEDONIA, APPELLANTS,
vs.
WILLIAM W. CORNELL AND LATHAM C. STRONG, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF LATHAM C. CORNELL, DECEASED.
} No. 527.

These suits are alike, brought in equity against the appellants and the city of Racine, jointly, to enforce the payment of certain bonds issued by the town of Racine in aid of the Racine, Janesville and Mississippi Railroad Company. The bonds were issued in 1853, pursuant to the provisions of chapter 289 of the Private Laws of Wisconsin for the year 1853, in exchange for stock in the same company; which stock at the time the town of Racine was merged in the towns of Caledonia and Mount Pleasant by the legislature, as set forth in the printed case, belonged to the same town of Racine. At that time, March 30, 1860, the town of Racine, or Orwell, as then named, was possessed of property and was owing debts, to recover which these suits are brought.

These bills were filed April 1st, 1873, and after the decision of this court in Morgan vs. Beloit City and Town, 7 Wall., 613. And they have, thus far, been believed to be within the principle of that decision.

First. Because here, as there, a statute of the state imposes upon one of the defendants the liability of paying a portion of the complainants' demand.

The language of the act being—

"SECTION 2. The city of Racine shall assume and pay so much of the municipal indebtedness of the former town of Racine, if any, as the lands described in the first section of this act may be or become legally chargeable with and liable to pay; *Provided*, That nothing in this section contained shall be construed to recognize, renew, or confirm any such municipal indebtedness of said former town of Racine."

This act is chapter 348 of the Private Laws of Wisconsin for the year 1871.

Secondly. Because independently of this legislation the liability of the town of Racine would have devolved with its property upon the defendant towns, Mount Pleasant and Caledonia, which absorbed its *entire* territory and property. The court below was of this opinion, and gave decrees in both suits for the complainants; the reasons for which are set forth in the opinion of Judge Drummond, reported in 7 Bissell, 148, and which is as follows:

"When these cases were submitted on the demurrer, the court stated its general conclusions on the law, and I see no reason to doubt the correctness of the conclusions there reached. The two cases are substantially alike. They have been presented to a master, who has taken proof, and they have come now for final hearing, but whether or not the report of the master may be of such a character as to entitle the parties to a decree may be questionable, but there probably can be an arrangement made between counsel by which a decree can be prepared after hearing the opinion of the court. I think the plaintiffs are entitled to a decree.

"When the bonds were issued on the 6th of December, 1853, as well as when the act under which they were issued was passed, April 2d of the same year, the town of Racine

consisted of all of fractional towns 3 and 4 of range 23, except what was within the limits of the city of Racine, and comprehended not far from thirty sections of land. It was bounded on the west by the town of Caledonia and of Mount Pleasant, and on the east by Lake Michigan. In 1856 the boundaries of Mount Pleasant were extended to the lake, so as to include nearly one-half of the town of Racine, thus cutting off the whole of the south part of the town, and including it within the limits of the town of Mount Pleasant. In 1857 the boundaries of the town were again changed. Caledonia and Mount Pleasant were both extended to the lake, and Racine was left lying between those towns, Caledonia on the north and Mount Pleasant on the south, the boundaries of Racine being extended from the lake to the western boundary of range 22, being four sections in width north and south, and thus constituted Racine comprehended on the east about thirteen sections which it had in 1853, and took in on the west what was then a part of Mount Pleasant, and Caledonia, being twelve sections from each town. With these boundaries the name of Racine was changed to Orwell. In 1860 the town of Orwell was vacated and all of its territory attached to the towns of Caledonia and Mount Pleasant, thus Racine, or Orwell, ceased to exist as an organized town. In 1871 there was added to the city of Racine a small part, namely, two or three sections of what was then Mount Pleasant, and of what was a part of that town and of Racine or Orwell in 1857, and a part of Mount Pleasant and Racine in 1856, and a part of Racine in 1853. The various changes are marked on the plans of the town, which are given by the master in his report of the testimony. This was the condition of the towns and the city of Racine when the bill was filed, and the question is, what are the rights of the parties?

"I have already said that it was not competent for the legislature to impair the obligation of the contract made by the town of Racine, as it existed in 1853, when the subscription was made to the railroad stock and the bonds issued. There was a contract between the parties which could not be affected by any subsequent legislation. When the town, by legislation, was brought within much narrower limits, what was the status of the case when this change was made? I think, according to well-settled principles, it must be understood, no legislation being had in relation to the

debts of the town, and Racine being left with those curtailed limits, the debt of Racine followed the town. The newly constructed Mount Pleasant, although it had taken in a portion of the old town of Racine, was not required to pay its debt, or any portion of it; it took, therefore, the territory from Racine, without the liability arising from its indebtedness, and the debt remained fastened upon the town of Racine as it was then bounded. If that is so, what was the condition of affairs when the boundaries were changed and Caledonia and Mount Pleasant were both extended to the lake, and Racine was left a strip of land four sections in width, from the lake to the western boundary of range 22? It had thus taken in a portion of the old town of Racine, and also a portion of Caledonia and Mount Pleasant, and the north portion of the town of Racine was cut off and placed within the territorial limits of Caledonia. There had yet been no legislation in relation to the indebtedness of the town of Racine, and I think the indebtedness was cast upon the town of Racine as thus newly constructed by the act of the legislature. A portion of the old territory was taken within the limits of the town; it had taken in also a portion of both Caledonia and Mount Pleasant. It thus had additional territory which it had not in 1853, from which it might be enabled to pay the debts it had then created, but the law of the case is, as I understand, the territorial limits of a town being absolutely within the control of the legislature, it was competent for it to change or alter in any respect, to diminish or add to, the territorial limits of the town, and nothing being said about any indebtedness, the debt followed the town as thus newly constructed, whether diminished or enlarged. When the town of Racine had thus been created by the act of the legislature, and the name of the town changed to Orwell, that change of name could not affect the rights of the parties. The obligations of the town still existed, and when Caledonia, Racine or Orwell, and Mount Pleasant were created —Caledonia on the north, Mount Pleasant on the south, Racine in the middle, extending from the western boundary of range 22 to the lake—then it was with the indebtedness of Racine, as created in 1853, or of Orwell, as it was subsequently called. This, then, was the position of the case when some important legislation took place upon the subject, and, as it has been stated, in 1860, Orwell ceased to be an organization, and its whole territory was annexed, part

to Caledonia and part to Mount Pleasant; then, and afterwards, there ceased to be a corporation municipal which was liable to the plaintiff for the former indebtedness of Racine, and there existed only the corporations of Caledonia and Mount Pleasant. According to the view I take of the case this circumstance did not impair or destroy the indebtedness of Racine; it was not competent, as I have stated before, for the legislature thus to put an end to the indebtedness. If that had been attempted it certainly would have been unconstitutional legislation; so that, I think, Caledonia and Mount Pleasant having taken, as corporations, the territorial limits of what was formerly Racine or Orwell, must equitably be held to be responsible for its debts.

"Having taken all the means with which the town of Racine could pay its indebtedness, it must be held that they stand in the place of Racine, and liable for the same. And we cannot take one and leave out the other, because by the same act of legislation the territory of Racine was attached part to one, and part to the other, operating, therefore, at the same time and upon both towns, and as the debt was against the town of Orwell at the last moment that it ceased to exist as a town, it was then transferred equitably to Caledonia and to Mount Pleasant. Then, in 1871, there was an addition made to the city of Racine. Between two and three sections of land were added to the city and taken from Mount Pleasant.

"The act which thus added to the limits of Racine declared that it should be liable (there seems now a new element in the legislation and that there must be some provision made for the debt of the town of Racine) to pay the debts of the town of Racine in proportion to the territory which it took. So here we have an act of legislation which makes it incumbent upon the city of Racine to pay its proportion of the indebtedness. If these principles are correct, the city of Racine being obliged by the express terms of the law to pay a portion of the indebtedness, and the towns of Caledonia and Mount Pleasant being also obliged, from the nature of the case, the only question is, how is the division to be made between these respective corporations? And it seems to me that it can only be made upon the proportion of territory which each of the towns took from Orwell.

"Now, the act of 1853, in authorizing the indebtedness of the town of Racine, declared that provision should be

made by a tax upon the property of the town to pay the interest on the indebtedness. It did not say in terms real estate, but upon the property; and it might be presumed to include both personal and real property. But it is obvious, I think, that it is impracticable, in the nature of things, for the court to determine the amount of personal property that may have been taken off from the town of Orwell by Caledonia, or by Mount Pleasant, and it seems to me that the only satisfactory method of determining the part of each is that the debt should be apportioned according to the territory that each took from the town of Orwell.

"A case has been recently decided by the Supreme Court of the United States (Laramie County vs. Albany County, 92 United States Reports, 307) the principle of which is, as it has been stated by the court, that when an indebtedness is created by a municipal corporation and there are created out of that corporation new corporations, such as counties or towns, the debt of the old corporation follows it within the new territorial limits, and the new municipal corporations are not bound to pay any portion of the indebtedness unless the act of division so prescribe. In that decision this language is quoted and approved by the Supreme Court in referring to the case of Bristol vs. New Chester, 3 New Hampshire, 534, as to the power to divide towns: 'The power in that regard is strictly legislative; and that the power to prescribe the rule by which a division of the property of the old town shall be divided is incident to the power to divide the territory. * * * Such a decision must be founded upon the circumstances of each particular case.'

"Now, that principle, it seems to me, applies to the peculiar circumstances of this case, and that the division must be made as I have suggested, namely: Caledonia must pay in proportion to the territory that it has taken from Orwell, and so must Mount Pleasant, and the city of Racine in proportion to the territory that it has taken, as prescribed by the act of the legislature."

Argument.

I.

This is a case where one town was merged in two other towns, the latter towns, succeeding to all the rights and immunities previously enjoyed by the former. It is not like

Laramie County vs. Albany County, 2 Otto, 307, where the legislature had diminished the area of a municipality, leaving the old municipality still in existence, when it was held that the old county was solely responsible for the debts and liabilities it had previously incurred, the legislature not having made any provision for apportioning debts or liabilities. In a case of that kind it is for the legislature to determine whether the municipality which acquires additional territory shall contribute towards the payment of the debts of the old municipality, and no obligation is implied. But where one municipal corporation goes entirely out of existence by being annexed to or merged in another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property, and be answerable for all the liabilities.

Judge Wagner says, in Thompson vs. Abbott et al., Board of Education, &c., 61 Mo., 176: "After said district No. 3 had ceased to exist, there was then no power remaining as an independent organization in its behalf to control its funds or pay off its indebtedness. Its property passed into the hands of the defendant, and when the benefits were taken, the burdens were assumed. The pleadings admit that plaintiff's claim is a just and honest debt, and that the annexation took place, and that defendant obtained possession of and control over the property of the said district which owed the debt. Then, manifestly, it becomes liable for its obligations."

This must necessarily be the case, for while no state "may impair the obligation of a contract," it may consolidate towns, making two of one; it may change the municipal organization by making three towns into two, by annexing the area of one to the other two, thereby wiping it out of existence, at the same time the inhabitants of the former town and the territory it embraced, are included in another town, which has the same powers, and enjoys the same privileges as the former town. If this transfer of territory and population

does not carry with it the liabilities of the town to which it succeeds, then it is not true that the states have not the power to impair contracts. Where there is an obligation in force and unimpaired, there must be some person obligated. When the entire territory of the town of Racine was annexed to Caledonia and Mount Pleasant it ceased to exist as a corporation, there was then no power remaining as an independent organization in its behalf to control its funds or pay off its indebtedness. In the words of the Missouri court, *supra*, "Its property passed into the hands of the defendant, and when the benefits were taken the burdens were assumed." This court say, in Laramie County vs. Albany County, *supra:* "Consolidation will work injustice where one of the corporators is largely in debt and the other owes nothing, as the residents in the non-indebted municipality must necessarily submit to increased burdens in consequence of the indebtedness of their associates." It is the consolidation which works this result necessarily and without any legislative provision. What have we here but consolidation? Does it make a difference whether an entire town is divided and annexed to the two existing towns, or undivided and annexed to one? Is it not consolidation in the one case as much as the other?

There is no question in these suits as to the validity of the bonds.

They were duly issued in pursuance of an act of the legislature of the State of Wisconsin, after a vote had been had of the voters of the town in favor of their issue.

A municipal corporation has one element peculiar to itself. I mean a territorial element. Without a territory it cannot exist. Its powers, its privileges, and its burdens must rest upon the inhabitants of some territory; and while the legislature may extend or diminish the area of that territory, it still remains the same corporation so long as it has a territory. I think I may say it has another peculiarity. It may be changed by the legislature from a town organization to a village organization, and from a village organ-

ization to a city organization; its charter may be entirely abrogated; its name changed and new and different powers conferred, and yet it is the same municipal corporation.

Boughton vs. Pensacola, 3 Otto, 266.
1 Saunders, 344.
Luttrel's Case, 4 Co., 87.

When once a municipal organization has been formed, embracing a certain territory, I know of no instance in our history where the inhabitants of that territory have been deprived of privileges of a municipal organization in some form. The English books say where the corporation is disabled to act and accepts a new charter, the ancient organization is not dissolved but dormant; and after such acceptance is the same corporation as before.—(1 Blk. Com., 591.) It is held in the case of Colchester vs. Seaber, Bur., 1866, that when a corporation accepts a new charter it remains the same as it did before; for if it were dissolved, the lands granted to it would revert to the donor, and the new charter could not divest the rights and regrant them to the new corporation. The corporation shall retain under its new name the possessions it had before, and shall recover by the new name a debt due before; on the other hand, it shall be subject to bonds and annuities as before."—(1 Saund., 344, note 1.)

The new organization under a new charter being merely the political machinery by means of which the community embraced within certain territorial limits exercise to some extent their governmental power, is held not to change the rights of property vested in the community, or impair its liability upon contracts made by it. It is claimed that the town of Racine has been abrogated by an act of the legislature; that, although the legislature has no power to impair the obligation of contracts, it may render the contracts valueless by taking away all means of enforcing it: by annulling a town organization and setting off its entire territory and inhabitants to other towns. What remained to

be done by the town of Racine as to these bonds? Nothing but to levy and collect taxes from the people within its territorial limits to pay the bonds. These taxes should be paid as other taxes are paid, from the property belonging to the inhabitants.

The inhabitants remain, occupying the same territory, exercising the same municipal powers, and enjoying the same municipal rights as before. They have the same town organization, a part of the territory in one town, a part in another, but the same political machinery is made use of by the same people for the same purpose. The towns within which the territory now lies exercise over it all the power that could be exercised by the old town of Racine. They collect taxes for town, county, and state purposes, and for all other purposes authorized by law, as fully as could the town of Racine.

There is, then, no lack of power in those towns to collect taxes for the payment of the bonds.

II.

The debt undoubtedly remained and still remains against the town of Racine, within the sense and meaning of the language used in the decision of New Orleans vs. Clark, 5 Otto, 654. That is to say, if for the time being the machinery used for collecting is impaired, or, possibly, in a given case, destroyed, yet the *obligation remains.* Against whom does the obligation remain? Against the municipal corporation? That was a mere creature of the law. It had a legal existence only, and that existence is taken away. It in fact clothed the inhabitants of a certain territory with certain powers, and among them the power to issue these bonds and bind the community for their payment. *There is where the obligation remains,* and when the territory or people are again invested with legal power to collect, or are annexed to or absorbed by another municipality having such power, then the obligation may be enforced. If the town of Racine still had a corporate existence, with a terri-

tory and inhabitants, (for no town can exist without territory and inhabitants,) it alone would be liable for the payment of those bonds.—(Laramie County vs. Albany County, 2 Otto, 314.) The old corporation would own all the public property within her new limits, and be and remain responsible for all debts contracted by her before the act of separation was passed.—(315, ib.) And the same is the rule of law in Wisconsin as to the burden of the debts.—(Town of Depue vs. Town of Bellvue, 31 Wis., 125.) What the law is in this state as to the ownership in such case of corporate real estate is not so easy to determine. The supreme court, in Town of Milwaukee vs. City of Milwaukee, held that the town of Milwaukee continued the owner in fee of a certain forty acres of land which before the division had belonged to the town, but which after the division fell within the city limits. This land was purchased by the town for purely corporate purposes, so far as the case shows, was not held upon any trust, nor was the decision placed upon the ground of trust. This decision has never been overruled in or by the same court.

But when the municipality thus indebted is obliterated and its entire territory annexed to other adjoining municipalities, each complete in their organization and fully empowered to levy and collect taxes for the payment of debts, in such case we maintain that the debt, with the present obligation to pay, devolves, with the property, upon the municipalities receiving the same.

Hence, had the boundary of the city of Racine not been enlarged by taking in a portion of this bonded territory, this suit would have been brought against the two towns alone upon their general liability to pay, because of having received and had annexed thereto all the taxable property which was originally subject to taxation, and I may say equitably if not legally pledged for the payment of these debts.

But because the territory thus annexed to the city of Racine was originally liable for the payment of these debts

when the same were incurred, the legislature had the power, on annexing the same to the city of Racine, to charge upon that city a portion of the old debt.

New Orleans vs. Clark, 5 Otto, 654.

That proportion of the old debt can surely be collected by and through the city of Racine, whatever may be the condition of the balance.

But the amount must first be ascertained. No mandamus can issue from a federal court to enforce collection until after judgment.

Riggs vs. Johnson County, 6 Wall., 189, 198.

As was the case in Morgan vs. Beloit, the adjustment of the amount to be paid by the city depends upon accounts and computations, which a court of equity can alone properly make.

In order to bind the towns it is necessary that they should be made parties. This cannot be done in a proceeding at law.

III.

But it is contended by the appellants that although the debt may remain an existing obligation against the town of Racine, subject to be collected in the future by or through some such affirmative legislation as was adopted in the case of the city defendant, and in New Orleans vs. Clark, *supra*, nevertheless, as no such legislation has yet been obtained, the defendant towns are under no obligation to pay any part of the debt. In other words, it is denied that the towns of Mount Pleasant and Caledonia by simply receiving by annexation the entire territory and revenues of the town of Racine became liable to pay these bonds.

The question for determination, then, is whether, under the circumstances, these towns became liable to pay these bonds without further legislation?

It is admitted that the legislature has the power, unless prohibited by constitutional provision, to amend charters,

divide and consolidate towns, and even exterminate a municipality.

Slawson vs. City of Racine, 13 Wis., 401–402.
Laramie County vs. Albany County et al., 2 Otto, 308.
Cooley on Constitutional Limitations, 1st ed., 193 and notes.

But it is quite as certain that the legislature cannot impair the obligation of contracts or legislate them out of existence.

Shall it be held in these cases that the legislature of Wisconsin intended to do just what it is admitted on all hands it had no power to do? Construe this legislation as appellants would have it construed, and you convict the legislature of just that unlawful attempt. Construe it as the appellees insist it should be construed, and no wrong is done or imputed. The integrity of contracts is maintained, and no stain of repudiation rests upon the state or the community which was the subject of legislation.

Admit all that is so clearly and satisfactorily stated in the opinion in Laramie County vs. Albany County, *supra*, and it only goes to the extent of showing that where, upon a division, a part of the old territory and the old corporation remain, and no provision is made as to debts or property, the debts remained upon the old corporation; not an intimation even against the position we maintain.

In New Orleans vs. Clark, *supra*, page 653, the statute which annexed Carrolton to New Orleans provided that all property of the former should be vested in the latter, and that the debts of Carrolton should be paid by New Orleans, &c. But in the opinion this court says: "Independently of this legislation the liabilities of Carrolton *would have devolved with its property upon New Orleans* on the annexation to that city, so far at least that they could be enforced against the inhabitants and property brought by the annexation within its jurisdiction." To this proposition is cited Broughton vs. Pensacola, 3 Otto, 266, in which a bill was filed in equity

against a *single* defendant asking for a decree for the amount of certain coupons held against the city of Pensacola, and that the city be compelled to levy a tax to satisfy the decree, upon the erroneous supposition that there was *no* remedy at law.

The bill was dismissed for the reason that there was an adequate remedy at law, this court holding that the reorganized city defendant was in fact and in law but a continuation of the same city which issued the coupons upon which the suit was brought. In arriving at that conclusion, however, the court uses certain language which, we think, enunciates the true principle which governs in cases like the present:

"The ancient doctrine, that upon the repeal of a private corporation its debts were extinguished and its real property reverted to its grantors, and its personal property vested in the state, has been so far modified by modern adjudications that a court of equity will now lay hold of the property of a dissolved corporation and administer it for the benefit of the creditors and stockholders. The *obligation* of contracts made whilst the corporation was in existence survives its dissolution. * * * In this case it is averred in the bill that the city of Pensacola, upon the surrender of its original charter, did not possess any property. It is not necessary, however, in the view we take of the proceedings for the reorganization of the city government, to consider the effect of an absolute repeal of the charter of a municipal corporation upon its obligations. Although a municipal corporation, so far as it is invested with subordinate legislative powers for local purposes, is a mere instrumentality of the state for the convenient administration of government, yet when authorized to take stock in a railroad company, and issue its obligations in payment of the stock, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guaranties which protect the engagements of private individuals. The inhibition of the Constitution which preserves against the interference of a state the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the *repeal* or modification of the charter of a corporation of that kind is not within the inhibi-

tion, *yet it will not be admitted*, when its legislation is susceptible of another construction, that the state has in this way sanctioned an evasion of or escape from liabilities the creation of which is authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporations, and the same territory, *it will be presumed* that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization.

"That such was the intention of the State of Florida in the present case, we have no doubt; to suppose otherwise would be to impute to her an insensibility to the claims of morality and justice which nothing in her history warrants. The principle which applies to the state would seem to be applicable to cases of this kind. Obligations contracted by its agents continue against the state, whatever changes may take place in its constitution of government. 'The new government,' says Wheaton, 'succeeds to the fiscal rights and is bound to fulfill the fiscal obligations of the former government. It becomes entitled to the public domain and other property of the state and is bound to pay its debts previously contracted.'"

The towns of Caledonia and Mount Pleasant succeed to the fiscal rights and, we insist, are bound to pay the fiscal obligations of the town of Racine. If the old corporation, says the court, is reorganized under one new charter, it will be *presumed* that the legislature intended a continued existence, and that the old liabilities should follow, although a new name is given and new powers granted. Suppose it is divided and reorganized under two new charters and made to constitute two municipalities, with the same form of government and the same powers as the old, but with new names, each having one-half of the territory of the old corporation and no legislative division or appropriation of

property or debts, substantially as in North Hempstead vs. Hempstead, 2 Wend., 110, can it be different in principle from the case supposed of a new organization with different officers and a different name under one new charter? Can the legislature be presumed to have intended to violate the sacredness of contracts and to have become insensible to the claims of morality and justice, in the one case, and in the other, to have acted with no such motive.

If, in the case last supposed, the debts would go equally with the property, it is quite as certain that the debts would follow the property into two old municipalities, whose boundaries are, as in this case, extended over or around all of the territory forming the old corporation thus extinguished. It is respectfully submitted that the legislature of Wisconsin did not intend by the legislation in question to impair the obligation of the complainant's contract, even to the extent of placing its enforcement in abeyance for a time, as is intimated in Berkley vs. Levee Commissioners, 3 Otto, 265, might possibly be done. There, by reason of the legislation of the State of Louisiana, *no officers* were in existence at the time the mandamus was applied for, who had power to levy a tax? No question whatever was raised as to liability of the municipality, its continuance or its termination; and the case has no application whatever to the one at bar.

The obligation of the contract may confessedly be impaired by legislation upon the remedy, even to the extent of rendering the mere obligation worthless. Such legislation is as much within the constitutional inhibition as that which in terms legislates the obligation out of existence.

Such a construction, therefore, of an act of legislation as will leave but the barren right, the bare obligation, without means of enforcement, will not be adopted unless absolutely necessary. The remedy will not be held to be taken away unless the language will admit of no other construction.

It was said in Morgan vs. Beloit, 7 Wall., 618, "the authority to tax for the payment of municipal liabilities in

cases like this is in the nature of a trust," citing Von Hoffman vs. City of Quincy, 4 Wall., 554, where the following language is used: "A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the *power thus* given cannot be withdrawn until the contract is satisfied. The state and the corporation in such cases are equally bound. The power given becomes a trust which the donor cannot annul and which the donee is bound to excute, and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other."

It is by taxation alone that municipalities are able to pay their indebtedness; it is the capital on which the contracting parties rely. The property, real and personal, belonging to the inhabitants within the town, is the subject of taxation and the source from which all its resources are derived. This court has said, in Broughton vs. Pensacola, 3 Otto, 266, when a municipal corporation is "authorized to take stock in a railroad company and issue its obligations in payment of the stock, it is to that extent to be deemed a private corporation and its obligations are secured by all the guaranties which protect the engagement of private individuals." It is to be deemed to that extent a private corporation and the inhabitants shareholders. It is an enterprise engaged in by their vote and for their benefit. They pay nothing at first for their shares, but are subject to call by way of taxation as the funds are needed to meet their liabilities to the full amount of their obligations.

They occupy the position of stockholders whose stock is not paid up, and if it become necessary to make his debt the creditor can enforce the payment of the stock. This source of revenue, this property, real and personal, which

was subject to taxation in the town of Racine, and constituted the only means by which her obligations could be paid, has become subject to taxation in the towns of Caledonia and Mount Pleasant and is now the source of revenue to those towns. This was the capital, so to speak, of the old corporation, the property which was subject to the debts of her creditors, and which has been transferred to those two corporations, leaving her debts unpaid. It is this property of which these towns are now in possession, which did belong to the town of Racine, that we seek to follow. As we could only reach it by taxation in the old municipality we can only reach it by taxation now through those means which are provided for the collection of revenue. It is said that it is a hardship, for those towns embrace some territory which was not within the town of Racine. We do not admit the hardship. By the consolidation of these towns the area of the town is greatly extended and the taxable property is largely increased and this added territory and taxable property must very much lessen the burden of taxation upon the rest of the town. We have no right to suppose that the consolidation was not an advantage to the entire community, and neither have we a right to suppose that it was made for the purpose of evading the payment of these bonds. The court below has decreed that these bonds are existing obligations, and that as the territory of the town of Racine has been annexed to and consolidated with the defendant corporations, and as that territory was the source from which the creditors had a right to collect their debts, that the defendant corporations shall pay those obligations in proportion to the territory annexed to each.

IV.

No further legislation is necessary to enable the complainants to recover against the two defendant towns.

The power to change boundaries of counties, towns, and municipalities, which rests in the legislature, must be viewed in connection with the constitutional restriction

against impairing the obligation of contracts, and, when so viewed together, the result is, in these cases, to leave the debt upon the two towns which have taken the old territory.

The general rule, so clearly illustrated in Burough of Dunmore's Appeal, 52 Penn. St. R., 375, that upon a division of an old town, possessed of property and owing debts, the old name and organization remaining, and no apportionment of debts and property, the old town retains the property and remains alone liable for the debts, had an exception engrafted upon it in North Hempstead vs. Hempstead, 2 Wend., 122. There, upon the division, each of the new towns was held to take and own the *common land* which fell within the bounds of each, or within its own boundaries. The act of division was silent upon this subject, but it was held that that act amounted to a partition.

In Montpelier vs. East Montpelier, 27 Vt., 704, a town was legislated out of existence, and two new towns by the same act created out of the same territory. By the act all the debts and property of the old town were divided in proportion to the tax-lists of the two new towns, but a trust property, of which the old town was strictly and only *trustee*, was held not to be divided, but simply that a trustee had *failed* by the old town being legislated out of existence, and, therefore, the court of chancery (29 Vt., 22) decreed that the trust and estate remained and that a new trustee be appointed by the court. Although this case is not strictly in point, it illustrates the principle for which we contend.

In North Whitehall vs South Whitehall, 3 S. & R., 117, Tilghman, C. J., says: "The two townships of North and South Whitehall were originally parts of and constituted one township, called Whitehall, which was divided into two on the 22d of November, 1810. Previous to the division the township of Whitehall became chargeable, and was charged, with the maintenance of a pauper, by an order of two justices of the peace. * * * After the division the township of South Whitehall continued to maintain the pauper,

and this action was brought to recover from North Whitehall its proportion of the expenses. * * * The case, then, will turn upon the main question, whether a *new township*, created by the division of an *old one*, is liable to a portion of the expenses of a pauper, who was a charge upon the *whole township* before the division. * * * Considering the charge of the pauper, as a burden upon the whole before division, equity would require that after division the burden should be borne by those parts which constituted the whole. These overseers of the poor are a body corporate and capable of taking goods and real estate to the value of £500 a year for the use of the poor, so that they are not only subject to the burden of the poor, but capable of enjoying valuable rights for their support. Supposing, then, the overseers of a township to be possessed of property, and aftewards the township to be divided, what is to become of the property? It has been argued by the defendant that the corporation of Whitehall was annihilated by the division, and that, therefore, the new townships were free from the maintenance of all paupers charged upon the old township until a new order was made by two justices. If so, they would have no right to any part of the property. But this, if there were property, is a proposition to which they would not so readily assent. The truth, however, seems to be that the charge of paupers before division was upon the whole township, from which neither of the two townships springing out of the division was exonerated. Each remains liable in proportion to its rates and levies, and in the same proportion each is entitled to the property which formerly belonged to the whole. The overseers are a body politic, created for the convenience of the township. They may hold property to a certain amount. They may sue and be sued. *They are the organs by which money is received and paid and the township acts. But the charge of a pauper, properly speaking, is upon the township and not upon the overseers, and the means of supporting him are found by the inhabitants of the township. The tax is laid upon them.*"

Judge Duncan, in the same case, p. 127, says: "But I am of opinion that the law confers a right; conferring a right, it gives a remedy; when there is a right to demand payment, the law implies a promise. Whenever the existence of a right is established, the court will adopt a suitable remedy, except under particular circumstances, where there are no legal grounds to proceed upon. *Here the only difficulty would be the apportionment to be borne by North Whitehall. But it is capable of ascertainment on equitable principles, and their action, which is in the nature of a bill in equity, would appear a proper remedy.* The overseers of the poor of Whitehall were a corporation, though without a seal. The individuals composing the whole body corporate were the taxable inhabitants of the whole district. They became chargeable with the support of the pauper, and they continued so as long as she remained incapable to support herself. This was a burden, an incumbrance on the whole, a continuing lien. * * By the division and change of name, was this incumbrance, this legal obligation, extinguished? For if this were the case, then the obligation to support the pauper, either by North or South Whitehall, was likewise extinguished, and the pauper must starve. I do not think this division and change of name could be attended with this distressing consequence. * * This pauper had a vested right by law to compel a support, by virtue of her settlement and the order of relief. A division by consent, or by order of the quarter sessions, or a change of name, could not take away this right or impair it. In law and in equity the whole taxable inhabitants for their ratable proportion remained liable."

See Plunkett Creek Township vs. Crawford, 27 Penn. St. R., 108.

Gibson Township vs. Nicholson Township, 2 S. & R., 422.

Dover vs. McClintock, 9 Watts & Serg., 80.

Wheatfield vs. Burch Valley, 1 Casey, 113.

The case of Plunkett Creek Township, *supra*, is where a town was divided into two parts, nearly equal, by the division of the county in which it was located, making two towns, each retaining the old name. Before the division a judgment existed against the old town—no mention is made in the case of any statute upon the subject of the debts of the town, and the court held that each new town was liable for the *whole* of the old judgment. The proceeding was by *scire facias* against the town in the new county, and the court below entered judgment for one-half the demand; defendant town took a writ of error to supreme court, where the judgment was affirmed; but the court said that if judgment had been entered below reviving the judgment against each new town for the full amount, it would have been correct. The opinion is short, and is as follows:

"A law made to divide a county ought not to have the effect of cancelling or shifting obligations if this can be avoided, for such a result is not involved in its intention. When, therefore, this township was bisected by a new county line, it does not follow that either section was absolved from the debts. This judgment was against the whole township, and when the law made two townships out of it, it made two defendants out of one without affecting the joint liability. But the same law placed one of the defendants out of the jurisdiction of the court that was to enforce the judgment; and hence arises the necessity for a corresponding change in the remedy. To revive and execute the judgment against one-half of the original township would not be giving the plaintiff his full remedy. When the law parted the defendants into two separate jurisdictions, it allowed a similar parting of the process and the revival of the judgment, severally, against each portion. It was not at all necessary and perhaps not strictly proper to divide the judgment so as to revive it for one-half against this defendant, (plaintiff in error,) for it might have been revived for the whole against each, though the full execution of one would satisfy the other, except for its costs. And if one defendant should pay the whole, this would lay the foundation of a claim for contribution."

That was in a case where the old town was *obliterated* like ours, and two new towns created and both held liable for the whole of the old debt, and in case one paid the whole, a case for contribution existed, which is not the case where a new town is created out of the old town, with *no* legislation as to debts.

In Groton vs. Shirley, 7 Mass., 156, the court say: "It is settled that when a new town is made out of parcels of two or more towns, including the inhabitants living on the parcels, all the inhabitants having settlements in the towns in which they dwell, acquire a settlement in the new town *by the act of incorporation.* But the defendant's counsel have endeavored to distinguish from that case the case where a part of an existing town is detached and annexed to another existing town. We are not satisfied that there is any ground for the distinction. Upon the annexation of Stanley to Shirley the inhabitants of Shirley were entitled not only to the benefit of all the lands in *leg*, but also to all the wealth, property, and personal securities of the inhabitants towards the discharge of the municipal debts of the town of Shirley; of all which the town of Stow by the annexation has been deprived. It would then be unreasonable to leave to Stow the burden of maintaining these inhabitants when they should become poor and unable by their personal labor to maintain themselves."

In Great Barrington vs. Lancaster, 14 Mass., 254, Chief Justice Parker says: "The paupers' original settlement was in Lancaster. * * On the annexation of that part of Lancaster where the father dwelt, to Shrewsbury, his settlement was transported to the latter town. For although no express provision respecting paupers appears in the act providing for such annexation, yet it is a necessary effect of such annexation that the town which acquires the new inhabitants and new territory should also incur such burdens as may be incident to the new relation."

I have cited these pauper cases for the purpose of showing that under some circumstances when a municipality has

been divided and a part has been annexed to another municipality, that the town which acquires the new inhabitants and new territory should incur such burdens as may be incident to the new relations, and that a new town is sometimes chargeable with part of the burdens of the old, without a statute expressly requiring it. How much more should an old town be charged with the obligations resting upon the inhabitants and territory she has acquired, when the inhabitants and territory so acquired constituted the whole of the municipality which created the obligations.

The fact that this entire territory was annexed to two towns instead of one makes no difference as to the liability, or the right of the complainants to recover. It may render it necessary to bring the suits in equity to determine the amount each should pay, but has nothing whatever to do with the right of recovery.

In Thompson vs. Abbott et al., Board of Education, &c., 61 Mo., 176, school district No. 3, became indebted, and was then legislated out of existence, by annexation of the territory to another municipality. It was held that the municipality taking the territory, by annexation also with it received and should bear its burdens and pay its debts. I fail to see any distinction between that case and ours. In that case there was no statute apportioning debts or property, and the decision was placed upon general principles. The two towns, Mount Pleasant and Caledonia, by the act of annexation and the absorbing of the entire territory of the town of Racine, received the benefit in about equal proportions, of all the lands, wealth, property, and personal services of the inhabitants of the town of Racine, towards the discharge of the municipal burdens, debts, and duties of those two towns. They each had thus added to their taxable property nearly, or quite, one-third; which consequently relieved each of about one-third of the burdens of taxation. By the act of annexation under such circumstances, the debt of Racine was transferred to the two defendant towns, to be by the said towns collected by taxa-

tion of the whole thereof. The burden did not remain alone upon the *part annexed* any more than in the pauper cases cited above. That part being liable for its proportion of all the burdens resting upon the town to which it was annexed, thus helped pay and discharge a sufficient amount of other public burden to entitle it in equity to the same aid and benefit from the municipality to which it was annexed as to its obligations. This is well illustrated by Layton vs. New Orleans, 12 La. Dec., 515, cited by Judge Dillon in his work on Corporations, pages 80–81, sec. 36.

V.

The towns being liable, and the city of Racine afterwards taking a portion of the same territory under the legislation quoted, what is the remedy of the complainants?

This question would seem sufficiently answered by the decision in Morgan vs. Beloit, *supra*. If I have succeeded in showing that the debt was transferred to the two defendant towns by the act of annexation, then it follows that when the city of Racine, in 1871, took part of the same territory, and was required by the act of annexation to "assume and pay so much of the municipal indebtedness of the former town of Racine (if any) as the lands described in the first section of this act (being the lands annexed to the city) may be or become legally chargeable with and liable to pay," she was in the same position as was the city of Beloit, after her creation out of the territory before then belonging to the town of Beloit. The language there used was a little more specific (see page 617, 7th Wall.), but it meant no more than the above. The city of Racine was to assume and pay so much of the old debt of the town of Racine as the annexed lands were or might be chargeable with—clearly meaning that the whole debt should be apportioned between the municipalities which had acquired the territory of the town of Racine, upon the basis of the value of the lands acquired by each,

and the city's proportion ascertained and paid by her. No joint action at law would lie against all the defendants.

Goodhue et al. vs. Town and City of Beloit, 21 Wis., 644, and for the reasons stated in Morgan vs. Beloit, *supra*, a joint suit in equity will lie, and it seems to be the only remedy the complainants have to collect their bonds.

We, therefore, insist that the decrees of the court below in these two suits should be affirmed.

WM. P. LYNDE,
Counsel for Appellees.

Filed

APPELLANTS' BRIEF.

April 23. 1879

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF MOUNT PLEASANT AND THE TOWN OF CALEDONIA, *Appellants*, *against* CHARLES BECKWITH. — No. 252.

THE TOWN OF MOUNT PLEASANT AND THE TOWN OF CALEDONIA, *Appellants*, *against* WILLIAM W. CORNELL AND LATHAM STRONG, EXRS., &C. — No. 527.

L. S. DIXON, and
JOHN T. FISH,
Appellants' Counsel.

Journal Steam Print, Racine, Wis.

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF MOUNT PLEASANT AND THE TOWN OF CALEDONIA, *Appellants*, *against* CHARLES BECKWITH. — No. 252.

THE TOWN OF MOUNT PLEASANT AND THE TOWN OF CALEDONIA, *Appellants*, *against* WILLIAM W. CORNELL AND LATHAM C. STRONG, as Executors of the last will and testament of LATHAM CORNELL, deceased. — No. 527.

These appeals involve substantially the same questions, therefore we make our brief in case No. 252 and submit it as our brief in No. 527.

In 1873 Charles Beckwith filed his bill of complaint in equity, in the Circuit Court of the United States for the

Eastern District of Wisconsin against the Town of Mount Pleasant. the Town of Caledonia and the City of Racine in Racine County, Wisconsin, to enforce payment of certain bonds issued by the Town of Racine in said County, in the year 1853, in payment of stock subscribed for and taken by said town in the Racine, Janesville and Mississippi Railroad Company.

The facts necessary to a determination of the questions involved in this appeal may be briefly stated.

The Legislature of the Territory of Wisconsin by an act approved January 2d. 1838, among other things established the Towns of Racine and Mount Pleasant and defined their boundaries. Plat No. 1, shows the town of Racine and the east part of the town of Mount Pleasant. And by an act approved February 7th, 1842, created and established the town of Caledonia and defined the respective boundaries of the towns of Racine, Mount Pleasant and Caledonia, as shown by plat No. 2.

The Legislature of the State of Wisconsin by an act approved August 8th, 1848, incorporated the City of Racine and defined its boundaries. Plat No. 3, shows the boundaries of the Towns of Racine, Mount Pleasant and Caledonia and the City of Racine at the time the bonds in question were issued, Dec. 6th, 1853. ff 65, 66.

The Legislature of the State of Wisconsin by an act passed and approved April 2d, 1853, authorized and empowered the Town of Racine to subscribe for and take capital stock of the Racine, Janesville and Mississippi Railroad Company to the amount of fifty thousand dollars, and pay therefor in the bonds of the town payable in twenty years in the manner prescribed by said act.

The Town of Racine on or about Dec. 6th, 1853, subscribed for and took fifty thousand dollars of said stock and issued its bonds therefor payable in twenty years. ff. 7, 8, 66, 70.

In 1856 the Legislature of Wisconsin changed the boundaries of the Towns of Mt. Pleasant and Racine and defined the same as shown by Plat No. 5, and in 1857 changed the boundaries of the Towns of Racine, Caledonia and Mount Pleasant and defined their respective boundaries as shown by Plat No. 6.

On the 2d day of December, 1859, the Board of Supervisors of Racine County changed the name of the Town of Racine to Orwell. ff. 68, 69.

The Legislature of Wisconsin by an act approved March 30th, 1860, vacated the Town of Orwell and attached all of its territory to the Towns of Mount Pleasant and Caledonia as shown by Plat No. 7, and by an act approved March 17th, 1871, made an addition to the city of Racine which is shown by Plat No. 8. f. 69.

On March 30th, 1860, the value of property of individuals within the Jurisdiction of the Town of Orwell was

Real estate, ...	$696,024 05
Personal property, ...	37,925 00

There came within the jurisdiction of the Town of Caledonia of this property

Real Estate of the value of . .	$298,112.00
Personal property of the value of . .	15,167.00
And within the jurisdiction of Mount Pleasant	
Real estate of the value of	$397,912.05
Personal property of the value of . . .	22,757.00

In 1874, the value of property in the Town of Caledonia, which was on that part of its territory attached in 1860, was

Real estate	$326,533.41
Personal property, ...	34,893.00

And the value of property within Mount Pleasant on that part of its territory attached in 1860 from Orwell, was

Real estate	$377,610.00
Personal property	35,470.00

And within the limits of the City of Racine on that part of its territory attached in 1871,

Real estate	$125,528.00
Personal property	9,385.00

Neither of the appellants by any corporate act moved the Legislature of Wisconsin, for the passage of any of the laws changing any of the territorial boundaries above specified or referred to. f. 71.

The stock of the Racine, Janesville and Mississippi Railroad Company was worth from fifty to seventy-five per cent. of par value from 1853 to 1856, which was the date of the last transaction in stock proven. Depositions of William C. Allen, p 46, Thomas Dickinson and Charles Herrick, p 49.

No property, or records of the Town of Orwell ever came to the possession of either of the appellants. Depositions of Orlando C. Munroe, p 47, Erastus C. Peck, p 48.

The appellants filed separate general demurrers to the bill of complaint, which were overruled by the Circuit Court and the appellants answered the bill, and the evidence being taken the Court entered a decree against the City of Racine, and the Towns of Mount Pleasant and Caledonia, apportioning the amount to be paid by each on the basis of the value of the real estate of individuals, which came within the territorial limits of each of the defendants by the acts of the Legislature passed in 1860 and in 1871, estimating such value as of the year 1874.

The opinions of the Circuit Court delivered on overruling the demurrers to the bill, and on the final hearing are reported in the 7th of Bissell at page 142.

Dyer, J. did not sit in the case—as the report shows—having been of counsel for the complainant.

ASSIGNMENT OF ERRORS.

I.

The Circuit Court erred in holding the appellants liable to pay the debt of the Town of Racine (or Orwell), incurred in the purchase of stock in a railroad company, or that such debt of the Town of Racine (or Orwell) became the debt of the appellants, to be enforced against them upon any ground or in any form of proceeding.

II.

The Court erred in holding that the property of individuals within the jurisdiction of Racine (or Orwell), was the primary fund upon which the complainant had the right to rely for the payment of his debt, and that the transfer of such property to the jurisdiction of appellants transferred to them liability to pay the claims of creditors of Racine (or Orwell), and that such liability was that of individual debtors and not that of trustees.

III.

The Court erred in holding that the power of taxation conferred upon the Town of Racine by Ch. 289 of the private and local laws of 1853, was by Ch. 242 of the laws of 1860 transferred to appellants to be exercised by them

severally upon all the taxable property within their jurisdiction.

IV.

The Court erred in holding that it had jurisdiction in equity, or that the appellants were in equity and good conscience liable to pay the complainant's claim against Racine (or Orwell).

ARGUMENT.

I.

The Circuit Court in effect held, that the Legislature of Wisconsin, by merely abolishing the Town of Racine (or Orwell), and by merely attaching the territory formerly within that town to the appellants, imposed upon them, without their consent, liability to pay the debt of Racine (or Orwell) incurred in the purchase of railroad stocks.

The Court so held upon an act, the language of which evinced no such purpose or intent on the part of the Legislature, even if the Legislature had the power, which is denied. The power, if it existed, could not be said to have been exercised by a statute which was silent upon the subject.

The Legislature must speak. Express words are necessary to the exercise of the power. But it is submitted that no such power existed to be exercised by the Legislature in any form. The act merely abolished the Town of Racine (or Orwell), and after such abolition attached the

territory formerly belonging to that town, to the appellants without other or further words.

To hold that the Legislature possessed any such power (even if attempt had been made to exercise it,) would be to hold that the Legislature could do by indirect means, that which it could not do by direct means. Had the Legislature by express act, attempted to impose liability upon the Towns of Mt. Pleasant and Caledonia, without their consent, the act would have been void upon fundamental principles of our law. In the language of the Court in Hampshire vs. Franklin, 16 Mass. 76, 84: "It certainly must be admitted that, by the principles of every free government, and "of our constitution in particular, it is not in the power of "the Legislature to create a debt, from one person to "another, or from one corporation to another, without the "consent, express or implied, of the party to be charged." "I do not see" says Mr. Justice Bradley in Barkley vs. Levee Commissioners, 1 Woods, 254, "how one corporation can "be made liable for the debts and obligations of another, "without voluntary assumption thereof." The same proposition has been directly affirmed by this Court in Girard vs. Philadelphia, 7 Wall., 1-14, where the Court say, that "the Legislature may alter, modify or even annul the fran-"chises of a public corporation although it may not im-"pose burdens on it without its consent."

The Towns of Mt. Pleasant and Caledonia were existing corporations at the time the act abolishing Racine (or Orwell) was passed, and as such had existed long before, and have so continued to exist intact to the present day, with only the usual powers of such corporations to be exercised for governmental purposes.

Their existence and identity as such corporations have never been interfered with or disturbed in the least. They are the same corporate entities or artificial beings now

that they were in 1838 and 1842 when first created, exercising the same powers, and performing the same functions, which were the objects of their creation, though the territory subject to their jurisdiction may not have been always the same.

With their corporate existence always thus preserved, distinct, independent, and distinguishable from all others, it is impossible to say, within the principle above laid down, that the debt of any other corporation, dead or alive can be imposed upon them against their will or without their consent. Annexing territory to such a corporation which formerly belonged to another, and declaring that such corporation shall pay the debts of that other, are two very distinct and dissimilar acts. The former may be done without the consent of the corporation added to, but the latter cannot be done except by such consent. If the Legislature can impose the debts of one previously existing corporation upon another in like manner existing, with annexation of territory to the latter, then it can do so without such annexation. The two acts have no necessary or natural connection. The act of imposing the debt derives its force, if force it has, from the mere exercise of legislative will, and if such power exists in the Legislature it exists as an absolute one, a power not qualified by the times or circumstances under which it may be exerted. But the authorities deny this power, and deny it as we understand them, altogether. No adjudicated case can be found, we believe, where any such attempted exercise of power has been upheld.

The case thus presented is far different from the case of the division of the territory of an existing corporation, and the creation of one or more new corporations within its former territorial limits. In such case it has been held, that the Legislature by the act so dividing and creating new corporations, may apportion the debt of the old corporation

between them. In such case the new corporations carved out of the territory of the old are regarded as in some sense identical with it, as being the original debtors already subject to the burden of an obligation to which they have given their assent. The burden is not imposed by the act of the Legislature in such case, but is only divided or apportioned, which may be lawfully done.

No consent of the newly created corporation or corporations is required, because such consent has been already given, and the Legislature merely apportions the common burden. Cases of that nature differ therefore very widely from the case at bar, and the principle upon which they proceed furnishes no ground for the decision of the Court below. The principle is in entire harmony with the rule for which we contend, and sustains that rule instead of militating against it.

The foregoing principle has been applied and enforced in cases too numerous to be cited. We refer the Court to the following:

Atkins vs. Randolph, 31 Vt. 226.
Laramie Co. vs. Albany Co., *et al.*, 92 U. S 307.
Town of Depere vs. Bellevue, 31 Wis. 120.
Milwaukee vs. Milwaukee, 12 Wis. 102.
St. Louis vs. Russell, 9 Mo. 503.
1 Dillon on Municipal Corporations, Ch. 4, Sec. 43.

But in the present case the indebtedness of Racine (or Orwell) was not incurred in the ordinary course of municipal government, or to defray the expenses thereof. It was an indebtedness of an extraordinary nature not strictly municipal and as to which it is everywhere held that an enabling act by the Legislature is necessary before the town can incur the obligation.

No such enabling act is claimed or pretended as to the

Towns of Mount Pleasant and Caledonia. Assent on the part of those towns would not therefore have given validity to any obligation or contract made by them to pay for the railroad stock. Such contract would have been *ultra vires* and void.

As to the stock in the Railroad Company purchased and held by the Town of Racine (or Orwell), and as to the indebtedness incurred in the purchase of such stock, the town became and was, a private corporation, holding the stock, and bound to pay the debt, in the same manner, and subject to the same conditions, as any other private corporation or individual. It will not be contended that an act abolishing the town and dividing its territory between two other towns, would operate to transfer the stock or its proceeds in whole or in part to either of such other towns. Neither can it be contended that an act merely abolishing the towns and dividing its territory between two other towns, transfers or imposes the indebtedness incurred in the purchase of such stock to, or upon such other towns. If, therefore, as we have endeavored to show, the Legislature cannot transfer a municipal indebtedness incurred for strictly municipal purposes, from one such corporation to another, and compel the latter to pay it, with how much more confidence may it be affirmed that the Legislature possesses no such power, with respect to the indebtedness of the kind here in controversy. The indebtedness under consideration required not only a special enabling act, but also the express consent of the corporation to be charged. It is an indebtedness which the Legislature has no power, against the will of a municipal corporation to compel it to incur.

We have already seen that the Legislature of Wisconsin never imposed, or attempted to impose this indebtedness upon the Towns of Mount Pleasant and Caledonia. If the

Legislature had done so the act would have been nugatory and void.

Hasbruck vs. Milwaukee, 13 Wis. 37-43.
Mills vs. Charton, 29 Wis. 413.
People vs. Batchellor, 53 N. Y. 128.
Horton vs. Town of Thompson, 71 id. 513.
People vs. Mayor, 51 Ill. 17.
Cooley's Const. Lim. Marginal p 231. (4 Ed. 284).
1 Dillon on Municipal Corporations, Ch. 4, Sec. 43.

But aside from general principles, the Constitution of the State of Wisconsin as expounded by the Supreme Court of the State, prohibits the Legislature from imposing any such liability or indebtedness, by contract upon a municipal corporation without its consent, the Legislature may authorize or permit but cannot compel. To compel would be to violate the clause in the Constitution of the State providing for uniformity of taxation, and also the clause which declares that there shall be but one system of town and county government, which shall be as nearly uniform as practicable. This was so held by the Supreme Court in a case precisely parallel, to-wit, the raising of money to pay bounty to soldiers, as to which it was decided, that the Legislature might permit the town to incur an extraordinary indebtedness for such purpose, but could not compel it to do so, or charge the town with the payment of moneys advanced by another for such purpose.

State *ex rel.* McCurdy vs. Tappan, Town Clerk, 29 Wis. 664, 677.

It seems hardly necessary to remark that this Court will be governed by the decisions of the Supreme Court of the State, in matters pertaining to the construction and effect of the State constitution and laws.

II.

As to the second error assigned, it is submitted that it was most clearly a mistake on the part of the Court below to hold that the property of the inhabitants of the town constituted a fund, out of which to discharge its debts or to which creditors might resort for their payment. A fund signifies a sum of money or other property deposited, appropriated or set apart for the payment of particular debts or expenses, or the accomplishment of some particular object. Where a fund exists the creditor or beneficiary is directly interested in the fund itself or in the income or proceeds of it. Here the creditor has no interest directly or indirectly in the property of the inhabitants of the town, nor in the proceeds thereof, nor in the income to be derived therefrom. He has no lien upon such property, the income or proceeds, and cannot subject it to the payment of his debt by any direct proceeding at law or in equity. He is interested only in the exercise of a mere power, the power of taxation over such property delegated by the Legislature of the State to the corporation, and to be exercised as the Legislature directs, and which does not constitute property or property interest, either in the corporation or in the creditor. If he were interested directly or indirectly in the property of the inhabitants of the town, as a fund for the payment of his debt, then it would follow that the property must always remain subject to the same liability from the time of the contracting of the debt until it is finally paid, and it would follow also that he might pursue such property, real or personal, into any other municipal corporation, and there enforce the payment of his debt out of it, or out of the proceeds of it. Yet this proposition all know to be

incorrect. It is not true that a creditor of a municipal corporation can do so. Owners of personal property subject to taxation within the town, may remove it out of the town at will, and the creditor has no remedy against the property, or to prevent its removal. So too the Legislature, in the exercise of its sovereign power over municipal corporations, to curtail, alter, modify and change their territorial limits, may remove the real estate, out of the corporation debtor and into another corporation, and the creditor is equally without remedy. For no one will contend that the corporation to which the personal property is removed, or the real estate is attached, can without special legislation authorizing it, exercise the power of taxation over such property, for the purpose of raising money to pay the original debt. The correctness of this proposition is illustrated by all the numerous authorities bearing upon this question, some of which are above cited. It is not true therefore, as was in effect held by the Court below, that the property of the inhabitants of the town, constituted a fund for the payment of its debts, so that detaching its territory and attaching it to another town, carried with it the obligation to pay its debts, or any part of them. No fund exists for the benefit of the creditor, until the taxing power has been exercised and the money collected. Then for the first time it becomes a fund for the payment of his debt.

The detaching of the territory of an indebted town and attaching it to the territory of another, constitutes no consideration for carrying with it, or imposing upon the other, the obligation to pay the debts. The territory attached is in no sense compensation for the obligation imposed or the payment to be made. The territory attached does not become the property of the town, to which it is attached, or of its inhabitants. It was not the property of the town, from which it was taken. As territory and inhabitants annexed, over which in the future it is to exercise govern-

mental jurisdiction it increased the expenses of the town in proportion to such territorial enlargement. This increased expense may be said to be compensated by the power of taxation over the territory and property added, so that in this respect the town may not be said to be the looser. But in all other respects the town gains nothing and suffers entire loss to the extent, it may be obliged to pay the debts of the town from which the territory was detached. The town has no means by which to subject the property attached to taxation, for the purpose of paying the debts of the town from which such property was detached. The creditor has no means of pursuing the same property by the power of taxation, for the same purpose. These views are fully sustained by the decisions of this Court in the following cases, and especially in the case first cited, in which the Court held, that the creditor had no remedy against the property subject to taxation, even where the tax levied to pay his debt was declared by law to be a lien upon such property.

Barkley vs. Levee Commissioners, 93 U. S. 258.
Rees vs. Watertown, 19 Wall. 107.
Heine vs. Levee Commissioners, ib. 655.

III.

It was error to hold that the power of taxation, possessed by the town of Racine (or Orwell), was upon the extinction of that town, and the annexation of its territory to the towns of Mt. Pleasant and Caledonia by the act of the Legislature, transferred to the latter towns, to be exercised by them *severally* upon all the taxable property within their respective jurisdictions, for the purpose of raising money to pay the debts of the extinct town.

The power of taxation does not exist in a municipal corporation for any purpose except as it has been delegated by the Legislature of the State. It is usually, if not universally, so delegated by express act, and the purposes for which it is to be exercised are specified. The act of 1853 delegated the power of taxation to the town of Racine (or Orwell) for the purpose of raising moneys to meet deficiencies in the payment of interest upon its bonds as specified in the act as applicable to that town. This was a delegation of power to that town and to that town alone, which could only be exercised by it under the same or some other name. It was a delegation of power to the towns named in the act, special and peculiar to those towns, and for a purpose in which those towns were supposed to be specially and peculiarly interested It was granted to those towns by special and local act, and not by general law.

Haveymier vs. Iowa County, 3 Wallace, 294.

Unlike other ordinary powers of taxation, it was a power not possessed by other towns, not possessed by the towns of Mt. Pleasant and Caledonia, and which has never been conferred upon them. Such being the nature of the power it follows that the corporation, to exercise it, must at all times be identified as the corporation to which it was delegated.

It is of the essence of such a power that it is incapable of transfer by implication or inference to another corporation, and nothing short of express enactment by the Legislature such as is required to create it, could be held to effect such transfer, and even then it would not be the transfer but the creation of a new power, of the same kind, in the corporation acted upon. Nothing but the fiat of the Legislature, which the learned Judge below, said, sufficed to extinguish the corporation agent possessing it, could operate to revive or restore it in any other corporation. It

could not survive by implication or inference arising from the extinguishment of the corporation possessing it, nor pass by the transfer of lands, in which that corporation had no interest, to the territory, or governmental jurisdiction, of another corporation. It was not a power coupled with an interest, or which attached itself to or ran with the lands over which it might be exercised. It did not run like a covenant to stand seized with the lands into the other town. It was at most a mere franchise not inhering in or pertaining to the lands, but existing in the corporation before its extinguishment, and which expired with the life of the corporation possessing it. But even if it did not so expire, it did not become a part of the franchises or powers of any other corporation, by reason of the extinguishment of the corporation possessing it. The doctrine of transmigration of souls does not apply in such a case, for even that doctrine does not send the soul out in fragments, to take refuge in different forms of existence or orders of created beings at the same time.

The act of 1860 in terms extinguished the corporation, destroying all its powers and franchises so far as the Legislature could do so, and made no provision for the continuance of any of them in any other corporation. If the law was valid such must have been its effect, but if invalid, then the town of Racine still exists, though its powers are sus pended. If valid, it must be for the reasons stated by this Court in Mumma vs. The Potomac Co., 8 Peters, 281, 286, 287. R. R. Co. vs. Maine, 96 U. S., 510. Atlantic & Gulf R. R. Co. vs. State of Georgia, Weekly Rep. No. 11, 321, 324, and in Miller vs. The State, 15 Wall. 478, and by the Supreme Court of the State of Wisconsin in Attorney General vs. Railroad Companies, 35 Wis. 425, 458, — that the destruction of corporations does not impair the obligation of their contract. If valid this special power of taxation was extinguished and so could not have passed in part to

one and in part to the other of the corporations appellant. If invalid then it still exists in the town of Racine (or Orwell) and so could not have been transferred to these corporations.

In no point of view therefore can it be said, that this power of taxation exists or can be exercised by any corporate body unless it can be said that the towns of Mt. Pleasant and Caledonia are the identical corporations, existing under two names, to which the power was originally delegated. If they are the same corporation, existing under two names, then they must be regarded as a single corporation, and must act as such in exercising the power, for the power is an entirety, incapable of division or of a divided exercise by different corporations at one and the same time.

The power, if it thus continued in the same corporation by the two names, must have continued as it existed at the time the act of 1860 was passed, for there is nothing in that act to change or modify or enlarge it. It must have continued to be exercised as at that time, over the same subject matter, that is the same territory and property, to which it then pertained. But none of these conditions exist. It is absurd to say that the corporations, Mt. Pleasant and Caledonia, are the identical corporation formerly known as Racine (or Orwell). It is equally absurd to say that for this purpose or any other, they exist as a single corporation or that they can act as such in exercising this power of taxation. They cannot act in concert and neither can act separately without infringing the jurisdiction of the other. As a divided power, if such a thing were possible, it is equally incompetent for either to act upon so much of the property of the former town of Racine (or Orwell), as lies within its borders. There is no law of the State authorizing such action. As a divided power it is as much a dead letter in the hands of the appellants as it would be in the

defunct town of Racine. By no possibility can it be exercised as it existed when Racine (or Orwell) was abolished; and if it cannot be so exercised then it cannot be exercised at all, for it is not and never was a power over or pertaining to the property of the inhabitants of Mt. Pleasant and Caledonia, outside of that annexed to those towns by the act of 1860. The proposition therefore maintained by the Court below, that it is a power to be exercised by each of these towns over all the property within their respective limits, as well that within their limits before the act of 1860 was passed, as that which came to them by annexation from the town of Racine (or Orwell) at that time, it is submitted is wholly untenable.

The foregoing views are fully sustained by the following decisions:

Barkley vs. Levee Commissioners, 1 Woods, 254.
Same Case, 93 U. S. 258.
Broughton vs. Pensacola, 93 U. S. 266.
Milner's Administrators vs. City of Pensacola, 2 Woods, 632.
Rees vs. Watertown, 19 Wall. 107.
Heine vs. Levee Comr's, ib. 655.
1 Dillon on Municipal Corporations, §116, and cases cited in note.

IV.

As to the fourth assignment of error it is submitted that equity has no jurisdiction in such a case as this, and that Heine vs. Levee Commissioners, *supra*, is decisive of this point.

It is furthermore submitted that instead of the appellants being liable in equity and good conscience to pay these

debts, that it is against equity and good conscience to compel them so to do. It will be remembered that the territory of the town of Racine (or Orwell) was annexed to them without their procurement or consent, and under circumstances where protest or resistance would have been unavailing. If they are to be made debtors therefor, then they are charged with the burden of paying the debts of others, contracted in a matter in which they had no interest, and from which they derived no benefit, and as to which they can never be reimbursed or compensated.

No more profound equity to resist a claim thus presented and attempted to be enforced, can well be imagined.

It is submitted that it was a most confused and erroneous idea of equity which led to the decree appealed from—an idea which would fasten upon one person or corporation, without contracting it and without obligation, legal or moral, to pay, the debt of another person or corporation, because such other person or corporation has ceased to exist. The death or destruction of the debtor, working total loss or a failure of remedy to the creditor, may be a great hardship and injustice to the creditor, but the hardship and injustice are no greater to him than to the stranger who may be visited, as by the decree, with the obligation of a contract into which he never entered or the payment of a debt he never incurred, and from which he never derived any benefit or advantage. There is no equity on the part of the respondent as against the appellants, the towns of Mt. Pleasant and Caledonia. If anything, the equities of the appellants are paramount and superior.

It is respectfully submitted that the decree entered below, and from which this appeal is taken, was erroneous, and should be reversed.

JOHN T. FISH, and
L. S. DIXON,
Of Counsel for Appellants.

OPINION OF THE CIRCUIT COURT.

DRUMMOND, J.—On the 2nd of April, 1853, the legislature of this state passed an act to authorize certain towns to aid in the construction of the Racine, Janesville and Mississippi Railroad.

By that act, the town of Racine was authorized to subscribe $50,000 to this railroad. The third section of the act declares, "that the board of Supervisors of the towns whenever the same shall become necessary, shall annually levy a tax upon the taxable property of the town, sufficient to pay the interest upon the bonds, which may be issued as a part of the subscription, after deducting the dividends due to the towns on the shares of the stock."

The stock was subscribed to this amount by the town of Racine, and bonds were issued, and those bonds, according to the allegations in the bill, have come into the hands of the respective plaintiffs for value; the have become, therefore, *bona fide* holders.

By various enactments of the legislature, subsequent to 1853, which it is not necessary to follow in detail, the town of Racine, which was authorized to subscribe this amount of stock to the railroad, was obliterated in name, and the territory which in 1853 was within the limits of the town of Racine, is now included, or was at the time these bills were filed, in the towns of Mount Pleasant and Caledonia, and the city of Racine. And the question is, What is the effect upon the rights of the plaintiff of this legislation in thus obliterating the town of Racine and bringing within the limits of the towns of Mount Pleasant and Caledonia and the city of Racine, the territory that was in 1853 com-

prehended within the town of Racine? In relation to those bonds, has the obligation of the contract thus made by the town of Racine been destroyed or even impaired? We think that it has not.

It is not claimed on the part of the defense that there is not a liability, or may not be, but it is insisted that whatever liability exists, is at law; and these being bills in equity, and there being a plain and adequate remedy at law, according to well settled principles, the bills in equity cannot be sustained. If the town of Racine were in existence, and could be sued, howmuchsoever its territorial limits might have been modified, changed or curtailed by acts of the original parties since 1853, then it might be said that there would be a complete remedy at law, because under such circumstances the town of Racine supposed to be existing as a corporation, would be subject to suit; process could be served upon it, and it could be brought into court. But can that be done now? It is said that inasmuch as the Constitution of the United States protects all contracts and prevents any legislation of a state which tends to impair them, for the purpose of enforcing them a corporation must be presumed still to exist, and subject to process; and so an action can be brought against it. If that is so, these bills cannot be maintained; but is that so in point of law and fact? We think it is not.

Counties and towns, are, as to their corporate existence, completely within the control of the legislature. They may be changed, altered, enlarged, diminished or extinguished by the mere act of the legislature. They are absolutely within the legislative control, and there can be no question of the power of the legislature to change or alter the town of Racine, and, so to speak, annihilate it as a town or corporation; and the question is when this is done, is there anybody, any entity *in esse* that can be sued.

OPINION OF THE CIRCUIT COURT.

DRUMMOND, J.—On the 2nd of April, 1853, the legislature of this state passed an act to authorize certain towns to aid in the construction of the Racine, Janesville and Mississippi Railroad.

By that act, the town of Racine was authorized to subscribe $50,000 to this railroad. The third section of the act declares, "that the board of Supervisors of the towns whenever the same shall become necessary, shall annually levy a tax upon the taxable property of the town, sufficient to pay the interest upon the bonds, which may be issued as a part of the subscription, after deducting the dividends due to the towns on the shares of the stock."

The stock was subscribed to this amount by the town of Racine, and bonds were issued, and those bonds, according to the allegations in the bill, have come into the hands of the respective plaintiffs for value; the have become, therefore, *bona fide* holders.

By various enactments of the legislature, subsequent to 1853, which it is not necessary to follow in detail, the town of Racine, which was authorized to subscribe this amount of stock to the railroad, was obliterated in name, and the territory which in 1853 was within the limits of the town of Racine, is now included, or was at the time these bills were filed, in the towns of Mount Pleasant and Caledonia, and the city of Racine. And the question is, What is the effect upon the rights of the plaintiff of this legislation in thus obliterating the town of Racine and bringing within the limits of the towns of Mount Pleasant and Caledonia and the city of Racine, the territory that was in 1853 com-

prehended within the town of Racine? In relation to those bonds, has the obligation of the contract thus made by the town of Racine been destroyed or even impaired? We think that it has not.

It is not claimed on the part of the defense that there is not a liability, or may not be, but it is insisted that whatever liability exists, is at law; and these being bills in equity, and there being a plain and adequate remedy at law, according to well settled principles, the bills in equity cannot be sustained. If the town of Racine were in existence, and could be sued, howmuchsoever its territorial limits might have been modified, changed or curtailed by acts of the original parties since 1853, then it might be said that there would be a complete remedy at law, because under such circumstances the town of Racine supposed to be existing as a corporation, would be subject to suit; process could be served upon it, and it could be brought into court. But can that be done now? It is said that inasmuch as the Constitution of the United States protects all contracts and prevents any legislation of a state which tends to impair them, for the purpose of enforcing them a corporation must be presumed still to exist, and subject to process; and so an action can be brought against it. If that is so, these bills cannot be maintained; but is that so in point of law and fact? We think it is not.

Counties and towns, are, as to their corporate existence, completely within the control of the legislature. They may be changed, altered, enlarged, diminished or extinguished by the mere act of the legislature. They are absolutely within the legislative control, and there can be no question of the power of the legislature to change or alter the town of Racine, and, so to speak, annihilate it as a town or corporation; and the question is when this is done, is there anybody, any entity *in esse* that can be sued.

One of the attributes of a corporation is that it can sue and be sued. If a corporation does not exist, How can it sue? It will be admitted that it cannot sue. How can it be sued? Manifestly upon no other ground than that a contract has not been impaired, and there must be a way of enforcing it, and the corporation must still exist for the purpose of suit and enforcement of the contract.

Obviously that cannot be so, unless there is some law in existence which creates and continues corporate functions for that purpose; which clothes some persons naturally or artificially with a capacity to be served with process, and brought into court, and to appear by counsel. It is said that by operation of law and in conformity with express enactments, the officers of corporations, of counties and towns continue in existence until their successors are elected and qualified; and inasmuch as in this case, when this town was obliterated by the fiat of the legislature and ceased to exist as a town, there were officers of the corporation in existence; that they have continued to exist as such officers up to the present time; and would as long as there was in existence a contract which could be enforced against a town.

Now, it is, I believe, about 14 years since there was a town of Racine. It is perfectly clear to me that the act of the legislature which is referred to, does not contemplate such a case as this when it declares that the officers of a municipal corporation shall continue in existence until their successors are elected and qualified.

In this case there could be no successors elected or qualified, because the capacity to elect had ceased to exist. And it certainly can only refer to cases where that could be done. Therefore, it seems to me that the conclusion is irresistible, that in this case, these officers did not continue

to hold an office to which successors can be elected or qualified.

The act of the legislature contemplates, and it necessarily implies, the continued existence of the corporation; therefore there is no person upon whom service can be had in an action at law, because there is no corporation in existence for the purpose of maintaining a suit at law.

Then the next point is, whether the contract has been destroyed because the legislature has destroyed the corporation. We think it has not. The act of 1853 declares that the interest upon these bonds should be paid in a particular way by the imposition of a tax upon the property at that time within the limits of the town of Racine. That was the fund which was provided for the payment of these bonds, or at any rate of the interest on the bonds; therefore, the creditor had a right to look to the taxing power of the town as his means of payment.

Now, the power of taxation which then existed, and which was recognized in the act of 1853 as the means of enforcing the payment of the debt which might be created is not gone, it has only been transferred to different municipal corporations. Whatever may be said of the personal property, the real, fixed property which could then be resorted to to pay this debt is still there, and the power of taxation still exists

It is a well recognized principle in equity, as a contract cannot be impaired, that where there is any fund to which the creditor has a right to resort for the enforcement or payment of the contract, it will be followed by a court of equity. It would be a reproach to the jurisprudence of this country, where the principle in the fundamental law of this union is that no state can pass a law impairing the obligation of a contract, if it were allowed to be impaired or destroyed, simply by the change of boundaries of a town,

or by striking out the name of one town and putting in the name of another; by the town of Racine ceasing to exist under legislative enactments, and Mount Pleasant and Caledonia and the city of Racine being substituted in its place.

Then this being so, that the contract still exists, and that a court of equity will enforce it, the question is, whether this is in the predicament of some of the cases that have been referred to, and particularly of the case decided by the Supreme Court of the United States, where it is said that there are many contracts which cannot be enforced, that there are many debts existing which can never be paid, and therefore, there may be the right without a remedy. I do not think that this case comes within that category. If there were nothing to which the creditor had the right to resort to enforce his contract, it might be so, like the case of the individual who is stripped completely of all means to pay a debt. There is a judgment, or decree, but the fault is not then in the law; it is because there is nothing which the party has to meet the decree, or satisfy it.

It may be conceded that there are some difficulties connected with the details of such a case as this, and a court of equity possibly in carrying out the objects sought in whole or in part by these bills, may meet with some obstacles in enforcing the obligations of the town of Racine; but it is to be hoped they will be met and overcome. If that cannot be done, it would be a very hard case for the creditors of our municipal towns and corporations, and particularly in this state, because all that it would be necessary to do would be simply for the legislature to pass a law changing all those municipal corporations, making others in their stead and making new boundaries, and in that way some municipalities could get rid of debts which they are now trying to avoid in ways not much more creditable. I do not think that can be done.

The counsel for the defendant insists that the remedy can only be pursued after a judgment has been obtained at law. His sense of justice and equity revolts at the idea of there being no remedy; but he says it must first be sought in an action at law. I have already stated the reasons why I think that cannot be done.

The principles declared in the case of *Curran vs. The State of Arkansas*, 15 Howard, 304, I think substantially dispose of most of the material questions in this case. It is true in that case the bank charter was not absolutely repealed, and it was undoubtedly competent to enforce the rights of creditors against a fund which the state had undertaken to control in derogation of their rights. But while that case declares that it is competent for the legislature to dissolve a corporation, it asserts that the dissolution of the corporation does not impair the obligation of the contract, and that a court of equity can enforce the contract by any of the various means within its power. There is one remark made by the court which, although it does not absolutely decide this question, still it is clear it was in the mind of the court. The court says, that whatever technical difficulties exist in maintaining the action at law by or against a corporation after its charter has been repealed, in the apprehension of a court of equity there is no difficulty in the creditor following the property of the corporation into the hands of any one not a *bona fide* holder.

It is true that was a bank, but as I have already stated, the control of the legislature over municipal corporations is absolute; and the fact that that was a bank, and this is a town can certainly make no difference. All the technical difficulties in the way of the maintenance of a suit at law, which are referred to by the court in that case, seem to be insurmountable.

In fact, I think that it would be found that the counsel

for the defense, if these parties had been sued at law, would have objected that no suit at law could be maintained against the town of Racine.

I have said that the power of taxation has not been annihilated. It still exists; it has only been transferred, and as at present advised, I should be inclined to think that it would be competent for the court to apportion this indebtedness among these various defendants in such a way as to make each one of them answerable in proportion to the fund that has come within its control for the payment of this debt. I do not say that that will ultimately be the view which the court may take of it; but as at present advised, I feel inclined so to hold. At any rate, it is clear to my mind that there must be some way by which those parties who have control of this fund, which the legislature set apart for the payment of this debt, can be made answerable for it.

Therefore, the demurrer will be overruled. The defendants may have reasonable time to answer.

On the final hearing of the cause, the following was the opinion of the court:

DRUMMOND, J.—When these cases were submitted on the demurrer, the court stated its general conclusions on the law, and I see no reason to doubt the correctness of the conclusions then reached. The two cases are substantially alike. They have been presented to a master, who has taken proof, and they have come up now for final hearing, but whether or not the report of the master may be of such a character as to entitle the parties to a decree may be questionable, but there probably can be an arrangement made between counsel by which a decree can be prepared after hearing the opinion of the court. I think the plaintiffs are entitled to a decree.

When the bonds were issued on the 6th of December, 1853, as well as when the act under which they were issued was passed, April 2d of the same year, the town of Racine consisted of all of fractional towns 3 and 4 of range 23, except what was within the limits of the city of Racine, and comprehend not far from thirty sections of land. It was bounded on the west by the towns of Caledonia and of Mount Pleasant, and on the east by Lake Michigan. In 1856 the boundaries of Mount Pleasant were extended to the lake, so as to include nearly one half of the town of Racine, thus cutting off the whole of the south part of the town, and including it within the limits of the town of Mount Pleasant. In 1857 the boundaries of the town were again changed. Caledonia and Mount Pleasant were both extended to the lake, and Racine was left lying between those towns, Caledonia on the north, and Mount Pleasant on the south, the boundaries of Racine being extended from the lake to the western boundary of range 22, being four sections in width north and south, and thus constituted, Racine comprehended, on the east about twelve sections, which it had in 1853, and took in on the west what was then a part of Mount Pleasant, and of Caledonia being twelve sections from each town. With these bounaries the name of Racine was changed to Orwell. In 1860, the town of Orwell was vacated and all of its territory attached to the towns of Caledonia and Mount Pleasant, thus Racine, or Orwell, ceased to exist as an organized town. In 1871, there was added to the city of Racine a small part, namely, two or three sections of what was then Mount Pleasant, and of what was a part of that town and of Racine or Orwell in 1857, and a part of Mount Pleasant and of Racine in 1856, and a part of Racine in 1853. The various changes are marked on the plans of the town, which are given by the master in his report of the testimony. This was the condition of the towns and the city of Racine

when the bill was filed, and the question is, What are the rights of the parties?

I have already said that it was not competent for the legislature to impair the obligation of the contract made by the town of Racine, as it existed in 1853; when the subscription was made to the railroad stock, and the bonds issued. There was a contract between the parties which could not be affected by any subsequent legislation. When the town, by legislation, was brought within much narrower limits, What was the status of the case when this change was made? I think, according to well settled principles, it must be understood, no legislation being had in relation to the debts of the town, and Racine being left with these curtailed limits, the debt of Racine followed the town. The newly constructed Mount Pleasant, although it had taken in a portion of the old town of Racine, was not required to pay its debt, or any portion of it; it took, therefore, the territory from Racine, without the liability arising from its indebtedness, and the debt remained fastened upon the town of Racine, as it was then bounded. If that is so, What was the condition of affairs when these boundaries were changed, and Caledonia and Mount Pleasant were both extended to the lake, and Racine was left a strip of land four sections in width, from the lake to the western boundary of range 22? It had thus taken in a portion of the old town of Racine, and also a portion of Caledonia and Mount Pleasant, and the north portion of the town of Racine was cut off, and placed within the territorial limits of Caledonia. There had yet been no legislation in relation to the indebtedness of the town of Racine, and I think the indebtedness was cast upon the town of Racine as thus newly constructed by the act of the legislature. A portion of the old territory was taken within the limits of the town; it had taken in also a portion of both Caledonia and Mount Pleasant. It thus had additional

territory which it had not in 1853, from which it might be enabled to pay the debts it had then created, but the law of the case is, as I understand, the territorial limits of a town being absolutely within the control of the legislature, it was competent for it to change or alter in any respect, to diminish or add to, the territorial limits of the town, and nothing being said about any indebtedness the debt followed the town as thus newly constructed, whether diminished or enlarged. When the town of Racine had thus been created by the act of the legislature, and the name of the town changed to Orwell, that change of name could not affect the rights of the parties. The obligations of the town still existed, and when Caledonia, Racine or Orwell and Mount Pleasant were created—Caledonia on the north, Mount Pleasant on the south, Racine in the middle, extending from the western boundary of range 22 to the lake—then it was with the indebtedness of Racine, as created in 1853, or of Orwell, as it was subsequently called. This, then, was the position of the case when some important legislation took place upon the subject, and, as it has been stated, in 1860, Orwell ceased to be an organization, and its whole territory was annexed, part to Caledonia, and part to Mount Pleasant; then, and afterwards, there ceased to be a corporation municipal which was liable to the plaintiff for the former indebtedness of Racine; and there existed only the corporations of Caledonia and Mount Pleasant. According to the view I take of the case, this circumstance did not impair or destroy the indebtedness of Racine; it was not competent, as I have stated before, for the legislature thus to put an end to the indebtedness. If that had been attempted, it certainly would have been unconstitutional legislation; so that I think Caledonia and Mount Pleasant having taken, as corporations, the territorial limits of what was formerly Racine, or Orwell, must equitably be held to be responsible for its debt. Having taken all the means

by which the town of Racine could pay its indebtedness, it must be held that they stand in the place of Racine, and liable for the same. And we cannot take one and leave out the other, because by the same act of legislation the territory of Racine was attached part to one, and part to the other, operating therefore at the same time and upon both towns, and as the debt was against the town of Orwell at the last moment that it ceased to exist as a town, it was then transferred equitably to Caledonia, and to Mount Pleasant. Then in 1871 there was an addition made to the city of Racine. Between two and three sections of land were added to the city and taken from Mount Pleasant.

The act which thus added to the limits of Racine, declared that it should be liable, (there seems now a new element in the legislation, and that there must be some provision made for the debt of the town of Racine,) to pay the debts of the town of Racine in proportion to the territory which it took, so here we have an act of legislation which makes it incumbent upon the city of Racine to pay its proportion of the indebtness. If these principles are correct, the city of Racine being obliged by the express term of the law to pay a portion of the indebtedness, and the towns of Caledonia and Mount Pleasant being also obliged, from the nature of the case, the only question is: How is the division to be made between these respective corporations? and it seems to me that it can only be made upon the proportion of territory which each of the towns took from Orwell.

Now the act of 1853 in authorizing the indebtedness of the town of Racine, declared that provision should be made by a tax upon the property of the town to pay the interest on the indebtedness. It did not say in terms, real estate, but upon the property; and it might be presumed to include both personal and real property. But it is obvious, I think, that it is impracticable, in the nature of things, for

the Court to determine the amount of personal property that may have been taken off from the town of Orwell by Caledonia, or by Mount Pleasant, and it seems to me that the only satisfactory method of determining the part of each is that the debt shall be apportioned according to the territory that each took from the town of Orwell.

A case has been recently decided by the Supreme Court of the United States; *Laramie County vs. Albany County*, 92 United States Reports, 307, the principle of which is, as it has been stated by the court, that when an indebtedness is created by a municipal corporation, and there are created out of that corporation new corporations, such as counties or towns, the debt of the old coryoration follows it within the new territorial limits, and the new municipal corporations are not bound to pay any portion of the indebtedness unless the act of division so prescribes. In that decision this language is quoted and approved by the Supreme Court, in referring to the case of *Bristol vs. New Chester*, 3 New Hampshire, 534, as to the power to divide towns—"The power in that regard is strictly legislative; and that the power to prescribe the rule by which a division of the property of the old town shall be divided, is incident to the power to divide the territory. * * * Such a decision must be founded upon the circumstances of each particular case."

Now that princicple, it seems to me, applies to the peculiar circumstances of this case, and that the division must be made as I have suggested, namely: Caledonia must pay in proportion to the territory that it has taken from Orwell, and so must Mount Pleasant, and the city of Racine in proportion to the territory that it has taken, as prescribed by the act of the legislature.

PRIVATE AND LOCAL LAWS OF WISCONSIN, 1853.

CHAPTER 289.

AN ACT to authorize certain towns to aid in the construction of the Racine, Janesville and Mississippi Railroad.

The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. The several Boards of Supervisors of the towns of Racine, in the county of Racine, and of the towns of Elkhorn and Delavan, in the county of Walworth, are hereby authorized to subscribe for their respective towns, any sum of money, not exceeding in each case, the amount hereinafter named, to the capital stock of the Racine, Janesville and Mississippi Railroad company, and pay for the same, in the bonds of said towns, payable within twenty years, with interest payable annually in the city of New York, not exceeding seven per cent. to-wit: the town of Racine, fifty thousand dollars, the town of Elkhorn, fifteen thousand dollars, and the town of Delevan twenty-five thousand dollars.

SEC. 2. The shares of stock in such Railroad company, thus taken by said towns, and all dividends arising from the same, are hereby irrevocably pledged for the payment of the interest and principal of said bonds, *Provided*, however, that the Board of Supervisors of said towns may sell such shares; but the proceeds thereof, and interest shall still be pledged to pay the interest and principal of said bonds.

SEC. 3. The Boards of Supervisors of said towns, whenever the same shall become necessary, shall annually levy a tax upon the taxable property of said towns, sufficient to

pay the interest upon such bonds, after deducting the dividends due to such towns, on said shares of stock.

SEC. 4. The Boards of Supervisors of each of said towns may annually appoint one Railroad commissioner, who shall attend the annual or special meetings of the stockholders of such Railroad company, for the e'ection of Directors thereof, and shall be entitled to cast one vote for every share of stock which said towns shall hold in such Railroad company; and in case of the absence of such commissioner, or inability to attend, to appoint in writing, under their hands some other porson who shall have the same powers.

SEC. 5. No bonds shall be issued in pursuance of the provision of this act, until a majority of the legal voters of said towns, voting upon said question, shall vote in favor of the same, at an election called by the said boards of supervisors for that purpose, to be held at the usual places of holding elections in said towns. At such election, those voting in favor, shall vote a ballot with the words inscribed thereon "For the Railroad." And those voting against, shall vote a ballot with the words inscribed thereon, "Against the Railroad." One weeks previous notice of said election shall be given, either in a newspaper printed in said towns, or by notice posted in three public places in each of said towns. Said election shall be conducted, and the returns thereof, made and canvassed in the same manner, as at the annual town meetings of said towns.

SEC. 6. This act shall take effect immediately.

Approved, April 2, 1853.

GENERAL LAWS OF WISCONSIN, 1860.

CHAPTER 242.

[*Published March* 30, 1860.]

AN ACT to vacate and extinguish the town of Orwell, in the county of Racine, and to attach the territory comprising the same to the towns of Mount Pleasant and Caledonia, in said county.

The People of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SECTION 1. The corporation and body politic, known as the town of Orwell, in the county of Racine, is hereby vacated and extinguished, and shall hereafter have no existence as a body politic and corporate.

SEC. 2. All that territory in said town of Orwell, lying north of the line between township No. three and township No. four, is hereby annexed to, and shall hereafter form a part of the town of Caledonia, in said county; and all of that territory in said town of Orwell, which lies south of said line, between said township No. three and four, is hereby annexed to, and shall hereafter constitute a part of the town of Mount Pleasant, in said county of Racine.

SEC. 3. All of the books, records and papers of said town of Orwell, shall, immediately after the passage of this act, be deposited by the person or persons in whose custody the same may be, in the office of the clerk of the board of supervisors of said county of Racine, and said clerk shall be the custodian thereof.

SEC. 4. There shall be elected, at each annual town

meeting in said towns of Caledonia and Mount Pleasant, a county supervisor for said towns, who shall be entitled to a seat in the board of supervisors of Racine county. The votes for county supervisor shall be returned and canvassed in the same manner as votes given for members of the Assembly.

SEC. 5. This act shall take effect and be in force from and after its passage and publication.

Approved March 30, 1860.